

## Chapter Eight

# INDIAN LAW

### INDIAN TRIBES AND THEIR RELATIONSHIP TO THE FEDERAL GOVERNMENT

#### The Trust Relationship

One of the fundamental issues in Indian law is the federal trust responsibility. Federally recognized Indian tribes have a unique legal relationship with the federal government. This relationship was articulated by Chief Justice John Marshall in what is known as the Marshall Trilogy: *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832).

In *Cherokee Nation v. Georgia*, the tribe filed suit in the United States Supreme Court to enjoin the State of Georgia from enforcing state laws on lands granted to the tribe by treaties. Chief Justice John Marshall held that a tribe is a “state,” but not a foreign state or a state under the Constitution. Instead, an Indian tribe “may, more correctly, perhaps, be denominated domestic dependent nations ...in a state of pupillage” and that [t]heir relation to the United States resembles that of a ward to a guardian.”<sup>1</sup>

In *Worcester v. Georgia*, Chief Justice Marshall reaffirmed a tribe’s status as a distinct political entity “under the protection of the United States”:

When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the [Indians]? ... This relation [in a treaty between the United States and an Indian tribe] was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.<sup>2</sup>

In exercising its trust authority, the federal government is held to the highest fiduciary standards. Courts have recognized that the federal government’s fiduciary responsibility over tribal assets are subject to executive management, including monetary trust funds, mineral resources, water and timber.

#### Congressional Authority Over Indian Tribes

Congressional authority over Indian tribes is often described as plenary. However, this authority is subject to some restrictions, including the trust authority and constitutional limitations.

The Indian Commerce Clause of the United States Constitution (art. 1 sect.8 cl. 3) gives Congress the authority “[t]o regulate commerce with foreign nations, and among the several states, and with Indian tribes.” The Indian Commerce Clause is the primary means for exercising

authority over tribes. See, *McClachan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) . Recent cases suggest that this authority must be “tied rationally” to the federal government’s trust responsibility. *Morton v. Mancari*, 415 U.S. 199 (1974).

### **Canons of Construction**

Because Congress has a fiduciary relationship towards Indian tribes, courts generally presume that Congress’ intent toward them is benevolent. In general, these canons provide that treaties and other federal action should, when possible, be read as protecting Indian rights and in a manner favorable to Indians

## **RELATIONSHIP BETWEEN INDIAN TRIBES AND STATES**

Most analyses of state relations with Indian tribes focus on jurisdictional issues. The Supreme Court has recognized the federal government’s constitutional authority over Indian issues. Indian treaties, executive orders and statutes have invalidated most state laws through the Supremacy Clause of the Constitution. In general, state law does not apply to Indian Country without a clear Congressional intent.<sup>3</sup> However, states do have authority when an issue does not affect Indians or their property and the issue does not conflict with any federal statute.<sup>4</sup> States also have authority over Indians outside of Indian Country.<sup>5</sup>

### **Intergovernmental Agreements**

In recent years, Indian tribes and state governments have worked to develop more helpful government-to-government relationships. Many tribes have entered into agreements to address funding and resource issues. For example, on many reservations, tribal police officers may be cross-deputized under state or federal law, allowing them to arrest a non-Indian committing a crime within Indian Country.<sup>6</sup>

### **Public Law 280**

In 1953, Congress enacted Public Law 280.<sup>7</sup> Under this law, 16 states acquired partial jurisdiction over the Indian Country within their borders. Six of these states were delegated jurisdiction over most crimes and several civil matters in Indian Country within their state.<sup>8</sup> The remaining ten states exercised the option of amending their own laws to assert jurisdiction over some criminal and/or civil matters.<sup>9</sup> (A list of states applying Public Law 280 and the type of jurisdiction asserted appears in Appendix A of this section).

Public Law 280 excepts a state’s authority to regulate or tax trust property and the hunting and fishing rights of Indians.<sup>10</sup> The Supreme Court has held that Public Law 280 does not transfer state regulatory authority, unless the state law is prohibitory in nature.<sup>11</sup> Because Public Law 280 does not specifically extinguish tribal jurisdiction, states and tribes may have concurrent jurisdiction over some issues.<sup>12</sup>

## **Jurisdiction of Courts**

### **Criminal Jurisdiction**

Criminal Jurisdiction over crimes committed in Indian Country is divided between federal, state and tribal courts. In general, if a state acquired criminal jurisdiction under Public Law 280, that state court has jurisdiction for crimes committed in Indian Country. In states where Public Law 280 does not apply, federal courts have jurisdiction over most major crimes. Most minor crimes are heard by tribal courts. However, if a criminal defendant is a non-Indian, then a tribal court does not have jurisdiction over that defendant. See, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Generally, the policing and arrest powers of the federal, state and tribal governments in Indian country mirror these governments' criminal jurisdiction. However, some special arrangements can be made to cross-deputize police officers with state and federal authorities.<sup>13</sup>

### **Civil Jurisdiction**

Except in states where Public Law 280 applies, civil cases arising in Indian Country when all the parties are Indian are within the exclusive jurisdiction of the tribal court. Similarly, tribal courts have exclusive jurisdiction if a case involves a non-Indian suing an Indian for events in Indian Country. A federal court can review such a case for the existence of tribal jurisdiction, but a state court does not have any jurisdiction.

State courts have jurisdiction over Indians for events occurring outside of Indian Country. However, if an Indian resides on the reservation, the state may not be able to obtain personal jurisdiction, serve process or execute a judgment.

### **Full Faith and Credit**

Some states have applied either comity or full faith and credit to recognize tribal laws and judgments. However, this has not been universally applied and varies from state to state. In general, many tribal courts give full faith and credit to state court judgments as a matter of comity.<sup>14</sup>

## **HUNTING, FISHING AND GATHERING RIGHTS**

The right to hunt and fish was expressly guaranteed to many tribes in their treaties with the United States. Even tribes who have treaties that are silent on hunting, fishing and gathering are presumed to have these rights. Tribes whose reservation land was created by Executive Order, statute or agreement also have hunting and fishing rights, even if the reservation does not include any of the tribe's aboriginal lands.<sup>15</sup>

Many tribes have developed their own regulatory and licensing requirements for hunting, fishing and gathering on their reservations.<sup>16</sup> Non-Indians wishing to hunt, fish or gather on Indian lands

must follow the tribe's laws.<sup>17</sup> States may not exercise their regulatory authority over on-reservation hunting and fishing unless it is essential for conservation purposes or the activity is conducted by a non-Indian on property not held in trust for a particular tribe or tribal member.<sup>18</sup>

Federal officials have no authority to regulate hunting and fishing activities on Indian lands unless expressly given to them by Congress. Federal officials have been given three enforcement functions:

- 1) Federal officials must help tribes to enforce tribal law, including a tribe's hunting and fishing laws
- 2) Federal officials may file suit on behalf of Indian tribes to protect the tribe's treaty rights.
- 3) Federal officials can enact conservation measures applicable to on- and off-reservation activities to protect a treaty resource.<sup>19</sup>

In addition to on-reservation hunting rights, many Indians have off-reservation hunting and fishing treaty rights.<sup>20</sup>

## **HIGHLIGHTED LAWS APPLYING TO INDIAN TRIBES**

### **The Indian Civil Rights Act**

Indian tribes are not limited by the Bill of Rights of the United States Constitution.<sup>21</sup> Therefore, in 1968 Congress passed the Indian Civil Rights Act ("ICRA") (25 U.S.C. Secs. 1301 et seq.). The ICRA applies much of the language of the Bill of Rights to Indian tribes, including the equal protection and due process clauses. Five rights guaranteed in the Amendments to the United States Constitution are not mentioned in the ICRA:

- The separation of Church and State
- The prohibition against discrimination in voting on account of race
- The right to convene a jury in civil trials
- The issuance of a grand jury indictment in a criminal trial
- The right to appointed counsel for indigent criminal defendants

The ICRA applies to "any person" who is subject to the jurisdiction of a tribal government. Thus, it restricts tribal government authority over Indians and non-Indians.<sup>22</sup> In particular, the ICRA limits tribal punishment in criminal cases to one year imprisonment or a \$5,000 fine, or both.<sup>23</sup> Despite the list of rights included in the ICRA, the only remedy for a violation is federal court review of a tribal court decision in a criminal case involving *habeas corpus*. 25 U.S.C. sec. 1303; See also, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

### **The Indian Child Welfare Act**

In 1978 Congress passed the Indian Child Welfare Act ("ICWA"), 25 U.S.C. sects. 1901-1963. The ICWA was passed to remedy the removal of Indian children from their parents. Prior to

passing the ICWA, Congress found that nearly one third of reservation children had been separated from their families by state agencies and placed in non-Indian households.<sup>24</sup>

To correct this problem, the ICWA establishes specific procedures for Indian child custody procedures:

1. Tribal courts have exclusive jurisdiction over Indian children in Indian Country. Public Law 280 tribes can obtain jurisdiction by submitting a petition to the Bureau of Indian Affairs, pursuant to the ICWA.<sup>25</sup>
2. Tribal courts have concurrent jurisdiction with state courts over Indian children residing off of a tribe's reservation.
3. State courts must notify an Indian child's tribe if a child custody proceeding is initiated in state court (because the child resides off of the tribe's reservation). The tribe has the right to intervene in the state court proceeding.
4. State courts must transfer the proceeding to tribal court if the tribe or either parent requests a transfer. The state court can refuse the transfer for "good cause."<sup>26</sup>
5. If a case remains in state court, that court can terminate parental rights only if there is proof "beyond a reasonable doubt" that continued custody by the child's family "is likely to result in serious emotional or physical damage to the child." A child may not be placed in foster care by the state without "clear and convincing evidence."<sup>27</sup>
6. If an Indian parent loses parental rights in a state court proceeding, the state court must follow these preferences for any adoptive placement before placing the child in a non-Indian household:
  - A. members of the child's extended family
  - B. other members of the child's tribe
  - C. other Indian families<sup>28</sup>
7. If a state court proceeding or placement of an Indian child violates the ICWA, the decision is subject to invalidation upon petition by the child's parent, Indian custodian or tribe.<sup>29</sup>
8. Tribal court custody decisions are entitled to the same full faith and credit as state court custody decisions.<sup>30</sup>

In addition, section 109 permits states and tribes to reach their own agreements over jurisdiction in child custody proceedings and other child custody matters. For example, a tribe and a state could agree that the tribal court would hear all child custody cases within the state involving an Indian child.<sup>31</sup>

### **The Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act**

Alaska Natives (Indians, Eskimos and Aleuts) hold their land under a unique system of federal laws including the Alaska Native Claims Settlement Act of 1971 (“ANCSA”), 43 U.S.C. secs. 1601-1628 and the Alaska National Interest Lands Conservation Act of 1980 (“ANILCA”), 16 U.S.C. secs. 3101-3133. ANCSA was passed in response to conflict between Alaska Natives who claimed aboriginal territory and non-Indians who were attempting to develop that territory. ANCSA extinguished all aboriginal title to land or water areas in Alaska. In return, the United States agreed to transfer approximately one billion dollars into a separate Alaska Native Fund.

ANCSA provided for the establishment under state law of village and regional corporations in which enrolled Alaska Natives would receive corporate stock. These corporations were then to select lands, patented in fee simple, set aside under ANCSA for the Alaska Natives. Approximately 44 million acres were set aside.

ANCSA also extinguished hunting and fishing rights. However, Alaska Native subsistence rights are recognized to various extents by ANILCA, the Marine Mammal Protection Act and state law.<sup>32</sup>

## **APPENDIX A**

### **LIST OF STATES WITH JURISDICTION OVER INDIAN TRIBES UNDER PUBLIC LAW 280**

#### **Original Six States Delegated with Jurisdiction over Most Civil and Criminal Matters under Public Law 280:**

Alaska — included in 1958 at the time of Statehood  
California  
Minnesota — except for the Red Lake Reservation  
Nebraska  
Oregon — except for the Warm Springs Reservation  
Wisconsin — except for the Menominee Reservation

#### **States Opting for Jurisdiction under Public Law 280:**

Arizona — assumed jurisdiction over air and water pollution

Florida — assumed full P.L. 280 jurisdiction

Idaho — assumed jurisdiction over compulsory school attendance; juvenile delinquency and youth rehabilitation; dependent, neglected and abused children; mental illness; domestic relations; operation of motor vehicles on public roads.

Iowa — only over the Sac and Fox Indian community in Tama County, limited to civil and some criminal jurisdiction.

Montana — over the Flathead Reservation, limited to criminal jurisdiction and later, by tribal consent, some domestic relations matters.

Nevada — over the Ely Colony and any other reservations that consent

North Dakota — limited to civil jurisdiction with tribal consent and no tribe consented

South Dakota — a federal court invalidated the state's jurisdiction

Utah — assumed full jurisdiction with tribal consent and no tribe consented

Washington — all fee patent land within Indian Country. Jurisdiction on trust land is limited to the following areas, unless a tribe requests full jurisdiction: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency,

adoptions, dependent children, operation of motor vehicles on public roads.

The following tribes in Washington requested full jurisdiction:

- Chehalis
- Colville
- Muckleshoot
- Nisqually
- Quileute
- Skokomish
- Squaxin
- Swinomish
- Tulalip



## Endnotes

1. U.S. (5 Pet.) At 17.
2. 31 U.S. (6 Pet.) 515, 551 (1832).
3. See generally, *The Rights of Indians and Tribes* (1992) by Stephen L. Pevar, Southern Illinois University Press, Carbondale, IL, p. 111.
4. *Indian Tribes as Sovereign Governments* (1988) AIRI Press, Oakland, CA, pp.38-39. p.41.
5. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).
6. *Indian Tribes as Sovereign Governments* (1988) AIRI Press, Oakland, CA, p.47.
7. codified at: 18 U.S.C. Sec. 1162 (criminal jurisdiction), 28 U.S.C. Sec. 1360 (civil jurisdiction).
8. *Indian Tribes as Sovereign Governments* (1988) AIRI Press, Oakland, CA, p.41.
9. *The Rights of Indians and Tribes* (1992) by Stephen L. Pevar, Southern Illinois University Press, Carbondale, IL, pp. 116-17.
10. *Indian Tribes as Sovereign Governments* (1988) AIRI Press, Oakland, CA, p.42.
11. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987).
12. *Indian Tribes as Sovereign Governments* (1988) AIRI Press, Oakland, CA, p.42.
13. *American Indian Law in a Nutshell*, 2<sup>nd</sup> ed (1988), William C. Canby, Jr., West Publishing Co., St. Paul, MN pp.143-44.
14. *American Indian Law in a Nutshell*, 2<sup>nd</sup> ed (1988), William C. Canby, Jr., West Publishing Co., St. Paul, MN pp.172-73.
15. See, *Menominee Tribe v. United States*, 391 U.S. 404 (1968).
16. *The Rights of Indians and Tribes* (1992) by Stephen L. Pevar, Southern Illinois University Press, Carbondale, IL, pp.193-196.
17. See, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).
18. *Puyallup Tribe, Inc. v. Department of Game*, 391 U.S. 392 (1968).
19. *The Rights of Indians and Tribes* (1992) by Stephen L. Pevar, Southern Illinois University Press, Carbondale, IL, pp.196-97.

20. *United States v. Winans*, 198 U.S. 371 (1905).
21. *Talton v. Mayers*, 163 U.S. 376 (1896).
22. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).
23. 25 U.S.C. Sec. 1302(7).
24. *The Rights of Indians and Tribes* (1992) by Stephen L. Pevar, Southern Illinois University Press, Carbondale, IL, p.296; see also, *The Indian Child Welfare Act: Federal Indian Law in State Probate Court Proceedings* (May 1986) by Barry L. Levine, Michigan Bar Journal, pp. 11-18.
25. 25 U.S.C. secs. 1911(a)-(b).
26. 25 U.S.C. sec. 1911(b).
27. 25 U.S.C. secs. 1911 (e) and (f).
28. 25 U.S.C sec. 1915(a).
29. 25 U.S.C. sec.1914.
30. 25 U.S.C. sec. 1911(d).
31. *The Indian Child Welfare Act Rights and Procedures* (The Falmouth Institute).
32. See generally, *Indian Tribes as Sovereign Governments* (1988) AIRI Press, Oakland, CA; *Felix S. Cohen's Handbook of Federal Indian Law* 1982 ed (1982), The Mitchie Co., Charlottesville, VA.

## Suggested Activities

### Books

Several books that employees may enjoy reading and discussing are listed below.

#### **American Indians, Time and the Law** (non-fiction)

by Charles Wilkinson

Charles Wilkinson is the Moses Lasky Professor of Law at the University of Colorado School of Law. He is a recognized expert in the field of Indian law and policy. *American Indians, Time and the Law* explores the evolution of Indian policy and law by looking at distinct points in American history.

#### **Indian Givers** (non-fiction)

by Jack Weatherford

Jack Weatherford is a professor of anthropology at Macalester College in St. Paul, Minnesota. *Indian Givers* describes the many contributions that Indian tribes have given to our government, culture, art and science.

#### **Pigs in Heaven** (fiction)

by Barbara Kingsolver

Barbara Kingsolver is a novelist, known for her vivid storytelling and exploration of human relationships. *Pigs in Heaven* is a novel about an Indian child, “Turtle,” adopted by a single woman. The family soon finds itself swept up by the policies and controversies surrounding the Indian Child Welfare Act. This novel is a sequel to Kingsolver’s earlier novel, *The Bean Trees*.

## **FUN FACTS CHALLENGE**

Have fun answering the following questions about Native American governments and law.

**1. Chief Justice John Marshall called Indian Nations \_\_\_\_\_ sovereign governments.**

- A) independent      B) dependent      C) extinguished

**2. Indian tribes \_\_\_\_\_ authority to determine membership in their own tribes.**

- A) have      B) do not have      C) have limited

**3. The Federal Government has a \_\_\_\_\_ relationship with Federally recognized Indian tribes.**

- A) trust      B) beneficial      C) reserved

**4. Congress has authority over Indian tribes through the \_\_\_\_\_.**

- A) Indian Commerce Clause of the United States Constitution  
B) The First Amendment  
C) The Fourteenth Amendment

**5. \_\_\_\_\_ gives some states partial jurisdiction over Indian Country.**

- A) The Major Crimes Act   B) Indian Civil Rights Act   C) P. L. 280.

**6. TRUE OR FALSE:**

**The Indian Civil Rights Act requires the separation of Church and State similar to that in the United States Constitution.**

**7. Under the Indian Child Welfare Act tribal courts have \_\_\_\_\_ jurisdiction over Indian children residing in Indian Country.**

- A) concurrent      B) limited      C) exclusive

**8. TRUE OR FALSE:**

**Indian tribes have authority to regulate hunting and fishing on their reservations.**

**9. Individuals who do not meet a tribe's official enrollment procedures may \_\_\_\_\_ by that tribe.**

A) be adopted                      B) not be adopted                      C) be dismissed

**10. "Indian Country" refers to \_\_\_\_\_.**

A) the boundaries of an Indian Reservation  
B) the aboriginal territory of Indian nations  
C) is defined in the Major Crimes Act

## **ANSWERS**

1. B) Dependent
2. A) Have
3. A) Trust
4. A) The Indian Commerce Clause of the United States Constitution
5. C) P.L. 280
6. FALSE
7. C) Exclusive
8. TRUE
9. A) Be Adopted
10. C) is defined by the Major Crimes Act